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No: 05-1486

In the Supreme Court of the United States

THE ESTATE OF BARBARA RAY, JUDY RICHARD ADMINISTRIX,
Petitioner,
v.
KEYSTONE COAL MINING CORPORATION,
Respondent,
And,
DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS,
Party in Interest

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE UNITED STATES' ANSWER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Solicitor General portrays Petitioner's arguments as mere prosaic challenges to the general authority of an ALJ to consider relevant evidence and the BRB's authority to remand in an appropriate case. It is an attempt to deflect the Court's attention from the compelling arguments raised in the petition for writ of certiorari, which include *inter alia*:

I. The current scope and standard of review utilized by the BRB is nebulous, excessive, and the source of improvident serial remands and administrative delays endemic to the Black Lung Benefits System.

II. The Director and the BRB's flawed oppressive interpretation of the judicially created requirement to 'weigh together' all evidence regardless of its materiality, is aberrant to the requirements set forth in the APA and it is not entitled to deference under the auspices of ***Chevron v. NRDC***, 467 U.S. 837 (1984), hereinafter ***Chevron***.

III. The current Black Lung Benefits System denies all litigants Due Process by failing to accomplish a timely final adjudication.

IV. Whether a divergence exists between the Sixth, Seventh, Third, and Fourth Circuit Courts concerning 1) the definition of the disease state and 2) the scope and standard of review.

All of these issues are developed thoroughly in the Petition for Certiorari and the Solicitor General's response, analogous to the lower Courts who heard this case, fails to either address or rebut these issues. The crux of the Government's response is an amalgam of restated Social Security administrative policy as it pertains to Black Lung review. Its reply does not specifically refute the critical issues raised by the Petitioner. Regarding the specific arguments raised by the United States in its response, the Petitioner replies as follows:

The United States asserts as fact that miner Ralph E. Ray smoked "two packs a day." The precise amount of cigarettes Mr. Ray smoked was never conclusively established. Moreover, as a coal miner, who typically worked at least half a day (ten to sixteen hour shifts) in a deep mine with a prevailing risk of methane ignition, it was not possible for him or any miner to smoke cigarettes while working underground.

Practical experience demonstrates the Government's contention that 'weighing all relevant evidence together makes common sense' is demonstrably false. To the contrary, the frequent and repetitious cycle of remands in the Black Lung Benefits System reveals the BRB and the Courts cannot feasibly apply this review standard. [1] Either the decision-makers sitting in the Black Lung Benefits System and the Appellate Courts are guilty of cataclysmic incompetence, or the Rule itself is defective and prone to misapplication.[2]

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[1] Counsel is convinced the ALJ, in response to the BRB's remand orders, scrambled to unearth some basis in the record to deny benefits and satisfy the BRB's view of the case. To that end, the ALJ spent two years mining evidence from a six-inch packet of ten-year-old medical records that were introduced in a prior proceeding and thereby discovered evidentiary pyrite in the reports of Drs. Bush, Tuteur, and Scott. Moreover, even Employer's Counsel did not rely on these stale records. Instead, it relied upon the testimony of Dr. Sinnenberg whose opinion was more relevant to the prevailing medical issues in this case. Of course, Drs. Bush, Tuteur, and Scott were not subject to cross-examination by claimant's counsel.

[2] Please see Appendix 2, detailing cases where up to eleven Court appeals and remands occurred in a single case due to the BRB's application of the 'weigh all evidence together requirement,' a purported 'simple common sense standard.' Petitioner titled Appendix Two in the Petition for Certiorari incorrectly. Professor Natkin and her students compiled a database of all accessible BRB

Judge Sloviter in ***Penn-Allegheny Coal v. Williams***, 114 F.3d 22, 25 (3d. Cir. 1997), recognized that evidence had to be material, i.e. actually have an affect upon the outcome of the decision before any remand was warranted. However, this portion of her opinion is universally eschewed, much to the detriment of all parties negatively affected by the rule. ***See e.g. Island Creek Coal v. Compton***, 211 F.3d 203, 208, 210 (4th Cir. 2000); (Res. At Fn 8). The Government's depiction of Petitioner's argument that satisfaction of the requirements of one of the Subsections conclusively proves the existence of pneumoconiosis even in the face of conflicting evidence is a grotesque oversimplification of Petitioner's position.

The plain language of the Statute only requires 'consideration of ***relevant*** evidence', it does not state or imply that evidence can or should be 'weighed together'. (emphasis added) **30 U.S.C.**

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opinions, which could be searched to assist Petitioners in this Petition. The database was never titled as indicated in the original Appendix and should read instead"BRB Database Covering Years 1999-2004." (emphasis added) The characterization petitioners chose was regrettable, and counsels have since apologized to Professor Natkin and her students.

§923(b). Both the Third and Fourth Circuit Courts of Appeals usurped the process and branded its view upon the Agency. The United States' view is based upon a false premise as it presumes each piece of evidence is critical to the decision, no matter how stale, how cumulative, or how irrelevant in violation of the APA's requirements. It is preposterous, presumptuous, and senseless to contend that every single piece of evidence is critical to a decision.[3] An ALJ is compelled to weigh evidence in an egalitarian manner despite the fact that the subject matters of Black Lung medical evidence are dissimilar concepts.[4]

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[3] Petitioner disputes the United States' assertion the CT-scan evidence was critical to the determination whether Mr. Ray suffered from 'legal' pneumoconiosis. Congress prohibits denial of a claim based upon the reading of x-rays due to its inherent fallibility as a diagnostic tool. **30 U.S.C §923(b); S. Rep. No. 743, 92d Cong., 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2312-16.** CT Scans of Mr. Ray's lungs are not germane or material to resolution of whether coal dust exposure was a factor in the worsening of Mr. Ray's chronic obstructive pulmonary disease. [See ***Consolidated Coal Co. v. Director, OWCP***, 294 F. 3rd 885, 893 (7th Circ. 2002)] {Recognizing the "absence of any regulatory requirement that a negative CT scan must trump all other evidence."}

[4] In its brief in opposition the United States, rather than showing a lack of a genuine controversy, advances arguments that go to the merits of the petition. (Res. 10, Res. 10 at Fn.8). These arguments

As a result, there is no point in the Director enacting two distinct administrative definitions of pneumoconiosis if the BRB and the Courts erase this distinction and erroneously 'weigh together,' evidence produced in support of such claims. **20 CFR §718.201(a)**. There also is no point in the Director's plain language that 'a doctor,' 'an x-ray,' or 'an autopsy' may support a finding of pneumoconiosis. **20 CFR §718.202(a).** Rather, the miner is burdened with the Sisyphean task of producing a plethora of antecedent and anecdotal medical records to substantiate the existence of a compensable claim. The Director understood the difficulty of proving the medical form of the disease, and promulgated the concept of legal pneumoconiosis to assist miners with obtaining benefits. **Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, *as amended*, 65 F.R. 79920, 79937-79938 (2000).** The Director in promulgating the current Regulations proclaimed that it intended to avoid burdensome State

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however are more properly developed in a merit brief after a grant of certiorari. A notable example exists in footnote ten where the United States argues competing inferences regarding the Director's failure to engage in further rulemaking following ***Penn Allegheny***. (Res. 12, Fn. 10).

Workers' Compensation burdens of proof. ***Id.*** at 79946-79947.

Yet, by requiring the ALJ to presume that each piece of evidence is relevant and weigh all dissimilar types of medical evidence together in the same manner, the Regulations creating legal pneumoconiosis are nullified and Congressional will is thwarted. Analogous to the mythological story of Sisyphus, the BRB and the Courts become the entity that tears the rock from the miner's grasp and then casts it forth down the hill. The law has regressed to the point where miners must prove entitlement under standards that are more demanding than the burdensome State Workers' Compensation standards. It is what the Director originally attempted to avoid in promulgating the current Regulations. ***Id.*** It is not a reasonable statutory interpretation entitled to ***Chevron*** deference, and it negates well settled principles of Administrative Law legislated in the APA.

If the United States' contention in their brief is correct, why then, do disparate views exist in the holdings encompassing the weighing of evidence in the Sixth and Seventh Circuits as opposed to the Third and Fourth Circuits? ***See Old Ben Coal Co. v. Scott,*** 144 F. 3rd 1045 (7th Circ. 1998), et. al., Petitioner's Writ, pp.10-11. It is clear

that United States Circuit Courts do not uniformly embrace the ***Penn-Allegheny*** standard.

The result of these gross misapplications of law and procedure is a remedial Statute that is no longer remedial. Only eight percent (8%) of eligible miners receive benefits. **Brian C. Murchison, Due Process, Black Lung, and the Shaping of Administrative Justice**, 54 Admin. L. Rev. 1025, 1048 (2002). No amount of judicial rhetoric or administrative rationale can repair the systemic failure of the Black Lung Review System without this Honorable Court's intervention. Certiorari is necessary to correct the misapplication of law and administrative procedure.

CONCLUSION

For the above reasons the Petition for Certiorari should be granted.

Respectfully Submitted,

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